No. 11,861

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING.

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To the Honorable Ninth Circuit Court of Appeals of the United States of America, and to Each of the Judges Thereof:

The appellees herein respectfully petition for a rehearing of the above entitled cause, and in support thereof, respectfully represent as follows:

An opinion of this Honorable Court was filed herein on February 14, 1949.

Your petitioners believe, and earnestly represent, that said opinion misconceives the factual situation upon which rests the application of the doctrine of comity invoked in the case at bar, and that by reason thereof an erroneous conclusion has been reached.

It is significant that in its invocation and application of this doctrine of comity, this Honorable Court has not mentioned the controlling facts, and the state law which, we believe, preclude the application of the rule invoked. We believe and urge that even though this Honorable Court may adhere to its announced conclusion, it ought nevertheless to make appropriate reference to the omitted elements, and set forth clearly the basis upon which their importance is disregarded, and the conclusion reached is determined.

I.

The Rule of Comity Upon Which This Opinion Rests Does Not Apply, Because in California the Doctrine of Class Actions Which Obtains in Many Jurisdictions, and in the Federal Courts, Is Not Recognized in the Circumstances of This Case.

The opinion of this Honorable Court rests upon the assumption that appellees, under the "class action" rule, are parties to a case prosecuted in the courts of the State of California by other aggrieved persons in which relief is sought against the zoning action here complained of.

This assumption as to the applicatoin of the "class action" rule is clearly erroneous. The rule invoked by this Honorable Court obtains in many jurisdictions and in the Federal Courts but it does not apply in California.

In California no one is bound in such an action who does not join in the action unless he accepts the benefits thereof. This record is devoid of any showing necessary to bring these appellees within this rule.

We cited the authorities in our brief, at pages 68 to 70 inclusive, which sustain this position. These authorities were not answered in the reply brief of appellants here and are not referred to in the opinion of this Honorable Court.

Each of the authorities relied upon by this Honorable Court in its invocation of this doctrine of comity deals either with the law of a state which recognizes the class action rule, which the State of California does not recognize, or with the rule which applies in the Federal Courts. None of them sustains the proposition that where the parties seeking a remedy under the Federal Constitution in a federal forum, are not parties, either actual, or fictional, under the "class action" rule, in a case being prosecuted in the state courts, they are to be denied their remedy in a federal court because of the pendency of the state case.

We find nothing either in the cases relied upon by this Honorable Court or elsewhere which supports the proposition that relief must be denied in a federal forum to a person who is not a party, as under the California rule these appellees are not, to a case prosecuted by other parties in a state tribunal seeking relief against a common source of injury.

II.

The Relief Which These Appellees Seek Here Cannot Be Obtained by Them in the Pending Case in the Courts of California, Because Under the Rule of Parties Which Obtains in California, They Are Not Parties to That Case, and in Addition Thereto, the State Court Is Without Jurisdiction to Maintain the Status Quo Until the Ultimate Disposition of the Case.

In our brief at pages 68 to 70 inclusive we made the showing supported by authority that in the pending state case the injunctive relief sought here by appellees could not be granted even though these appellees were actually made parties to that case.

These authorities have not been answered either in appellant's brief or in the opinion of this Honorable Court.

We respectfully submit that it would be manifestly unjust to deny appellees the relief they seek here when the relief sought could not be obtained in the pending state case brought by other parties.

We believe and urge that the opinion of this Honorable Court is subject to the criticism of the dissenting opinion in 87 Lawyers Edition, page 1442, where it is said that *"The opinion of the court cuts deeply into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred."*

III.

The Res of This Action and of the State Action Referred to Is Not the Same. It Is Different as to Each Property Owner.

We submit that this Honorable Court errs in its assumption that the *res* in this action is the same as the *res* in the pending state case. Clearly the right of each of these appellees is derived from the fact of his ownership of real property which may be injuriously affected by an unreasonable exercise of police power. It may well occur that as to one or more but less than all of the property owners involved in the two suits, the zoning action complained of would be an unreasonable and therefore void exercise of the police power because of its unreasonable interference with the enjoyment of the properties respectively of such persons, and yet as to all other property owners the zoning action complained of would be good.

It cannot be said, therefore, in any real or legal sense that the *res* in the two actions is the same. In these circumstances it is not proper for this Court to refuse jurisdiction at the instance of a property owner who may be circumstanced differently than another property owner. His complaint against the zoning power may be good, although the complaint of other property owners may be bad.

It has never been the rule or the practice, except in clear cases, to deny to any person his day in the Court of his own choice where the enjoyment of his own real property is at stake, simply because the owner of some other real property is seeking in another forum the same relief in respect of his individual property.

The actual and recognized dissimilarities in parcels of real properties, distinguishes any case in which they con-

stitute the *res,* from the property involved in what is known as the "common fund" cases. Here there is no "common fund," and there are no properties identically situated or affected in identically the same manner in respect of the zoning action complained of.

Conclusion.

In conclusion, we respectfully submit that this petition should be granted and that upon a rehearing this Honorable Court should hold that because of the minority rule of "class actions" which obtains in California, these appellees are not to be denied their right to pursue their equitable remedy here simply because of the pendency of another case by other parties in the courts of the State of California, and that there is not such an absolute identity and similarity in the *res* in this action (the individual properties of these individual appellees) and the *res* in said state action as to preclude the prosecution of this suit.

The proposition presented here is of utmost importance. It vitally affects the constitutional rights and remedies of these appellees. If the door of the Federal Court is closed to them, it means that they are without remedy to maintain a *status quo* until the ultimate determination of the validity of said zoning action, because they are not, and cannot be required to be, and cannot be, parties either actually or fictionally to the pending state case.

We respectfully submit that this petition should be granted.

Oliver O. Clark,
Attorney for Petitioning Appellees.

Certificate of Counsel.

I, Oliver O. Clark, counsel for petitioning Appellees in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

OLIVER O. CLARK,
Attorney for Petitioner.